

ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
SARAH J. HEFFLEY, JUDGE

DIVISION IV

CA CR 07-674

March 12, 2008

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| JAMES LONG | | APPEAL FROM THE SALINE COUNTY |
| | APPELLANT | CIRCUIT COURT |
| | | [NO. CR-2005-405-A3] |
| V. | | |
| | | HONORABLE GRISHAM A. PHILLIPS, |
| | | CIRCUIT JUDGE |
| STATE OF ARKANSAS | | |
| | APPELLEE | AFFIRMED |

Appellant, James Long, entered a plea of guilty to possession of marijuana with intent to deliver, reserving his right to appeal the denial of his motion to suppress the physical evidence against him. On appeal, appellant argues that the search of his home was unlawful and violated his Fourth Amendment rights. We affirm.

In his motion to suppress, filed May 30, 2006, appellant argued that police officers had searched his home without his consent and in the absence of any exigent circumstances that would give rise to probable cause or justify a warrantless search. Appellant also argued that the fruits of a subsequent search, for which the police obtained a warrant based in part on evidence found during the initial unlawful entry, should also be suppressed. A hearing on the matter was held on June 5, 2006.

The testimony presented at the suppression hearing revealed the following chain of events. Officer Lance Smith of the Benton Police Department testified that on April 23, 2005, he was approached by appellant in the parking lot of the police station. Appellant, who appeared to be upset, told Smith that two Hispanic males had broken into his house, threatened him with guns, and demanded all of his money. When appellant's pit bull came into the room, one of the males shot the dog in the head, and the men then fled the scene in a tan Ford Explorer. Smith observed appellant's girlfriend, Angelina Espino, in the passenger seat of appellant's vehicle and a dog with an obvious bullet hole on its face. Smith told appellant that he needed to go to appellant's home and secure the crime scene; appellant told Smith that he had to get his dog to a veterinary hospital in Maumelle. Smith then asked if the door to appellant's home was locked, and appellant responded that it was. Appellant obtained a house key from Espino and gave the key to Smith. According to Smith, appellant gave him permission to enter the house and secure it, and Smith told appellant to call him as soon as he had taken care of his dog.

Smith called his lieutenant, Scott Hodges, who met him at appellant's residence. Smith noted that there was a camera mounted above the front door. The officers entered the house with their guns drawn, as there was the possibility that the robbers had returned. Inside the house, Smith noticed a strong odor of marijuana. In one bedroom, Smith observed "a lot of residue that had like a square shaped around it like something had been removed, and the residue was all around it." Also in the bedroom, Smith saw marijuana stems, an ashtray full of marijuana stems and "blunts," or hand-rolled marijuana cigarettes, and a set of digital scales.

The officers also saw numerous “blunts” in the living room. After the house was secured, another officer who had arrived on the scene began to photograph the inside of the home. Appellant’s parents also arrived at the scene. One of the officers then left the scene to secure a search warrant while the other officers waited outside.

Officer Patrick Baker testified that he was contacted by Smith regarding a residential burglary and aggravated robbery on April 23, 2005. Baker testified that after Smith and Hodges had secured the house, he began taking pictures and looking for a shell casing. Baker stated that Smith pointed out a marijuana cigarette that was in plain view, and Smith told Baker he had seen other vegetation and stems throughout the house. Baker testified that he continued to process the scene while Smith began collecting the marijuana cigarettes and other drug evidence. Baker then found a pan of soil and what he believed were marijuana seeds in the kitchen, and at that point he stopped processing the scene and left to obtain a search warrant. Baker testified that appellant’s parents arrived at the scene within twenty to thirty minutes of his arrival.

Appellant testified that he had gone to the police department because his dog had been shot and he was trying to locate a vet. Appellant testified that he asked Smith where he could take his dog, and Smith told him there was a veterinary hospital in Maumelle. Appellant stated that Smith asked where his house was and asked if appellant had a key. Smith then took the house key from Espino. According to appellant, he told Smith that he did not need to go into the house and that no one was in the house. Appellant also testified that while he was in Maumelle, Smith called him from appellant’s father’s cell phone and said that he needed

written permission to go into appellant's house. Appellant testified that he told Smith that "when I get done with my dog here in Maumelle, then I'll come down here and let you in, but otherwise, no." Appellant contended that Smith never told him he had the right to not consent and that he had never given Smith permission to enter the house.

Espino testified and corroborated appellant's version of events. Specifically, she testified that Smith told them he needed to secure the scene and took the house key out of her hand. She also testified that appellant had told Smith he did not see the need in Smith going into the house, and after Smith called appellant at the veterinary hospital, appellant told Smith not to go into the house.

Randall Long, appellant's father, testified that he and his wife were informed of the break-in by appellant, and they immediately went to appellant's house. Long testified that Smith was already at the house when they arrived. Long stated that Smith told him the police had received an anonymous call that marijuana was being sold out of the house. According to Long, Smith then called appellant on his own cell phone, not Long's cell phone, and Long heard Smith tell appellant that he needed written permission to go into the house. Long testified that Smith waited for approximately five to fifteen minutes, then Smith stated "I'm going in anyway" and proceeded to enter the house.

Smith was recalled as a witness and explained that while Baker was processing the scene, he was informed by dispatch that an anonymous caller had called and stated there were marijuana, pills, and money in the attic of the home. Smith testified that he did not tell appellant that he needed written consent to enter the house.

In an order filed February 5, 2007, the court denied appellant's motion to suppress. In its order the court found:

[T]he officer either requested a key from the Defendant(s) or he was offered a key by one of the Defendants. Either way, he was in receipt of a key to the Defendant's residence. Any reasonable person, including a reasonable police officer, would conclude that legal possession of a key constitutes permission to enter a residence. Likewise, no reasonable person would give another person a key without expecting that the other person might use it.

Appellant was subsequently sentenced to four years' probation and ordered to perform community service and pay fines and costs in the amount of \$1200. A timely appeal to this court followed.

In reviewing a circuit court's denial of a motion to suppress evidence, this court conducts a de novo review based on the totality of the circumstances. *Hamilton v. State*, 97 Ark. App. 172, ___ S.W.3d ___ (2006). We review findings of historical facts for clear error, and we determine whether those facts give rise to reasonable suspicion or probable cause, giving considerable weight to the findings of the trial judge in the resolution of evidentiary conflicts and deferring to the superior position of the trial judge to pass upon the credibility of witnesses. *Id.* The trial court's ruling will not be reversed unless it is clearly erroneous. *Gonder v. State*, 95 Ark. App. 144, 234 S.W.3d 887 (2006).

It is settled law in this state that warrantless entry into a private residence is presumptively unreasonable under the Fourth Amendment. *Burroughs v. State*, 96 Ark. App. 289, 241 S.W.3d 280 (2006). Nonetheless, that presumption may be overcome if the police officer obtained consent to conduct a warrantless search. *Id.* The State bears the burden to

demonstrate clear and positive testimony that consent was freely and voluntarily given.

Gonder, supra.

On appeal, appellant contends that the entry into his home was clearly a search, regardless of whether the officers entered the home to search for evidence related to criminal acts by appellant or merely to secure the crime scene. Our rules of criminal procedure define a search as:

any intrusion other than an arrest, by an officer under color of authority, upon an individual's person, property, or privacy, for the purpose of seizing individuals or things or obtaining information by inspection or surveillance, if such intrusion, in the absence of legal authority or sufficient consent, would be a civil wrong, criminal offense, or violation of the individual's rights under the Constitution of the United States or this state.

Ark. R. Crim. P. 10.1(a) (2007). According to appellant, the entry by the police was a warrantless search that was unsupported by consent, probable cause, or exigent circumstances.

To support his argument that the officers lacked consent, appellant cites *Rodriquez v. State*, 262 Ark. 659, 559 S.W.2d 925 (1978), as well as his own testimony that he did not give consent. In *Rodriquez*, our supreme court reversed a finding that the defendant had voluntarily consented to a search of his car after giving the officer the key to his trunk. Although the officer testified that Rodriquez consented to the search and gave him the key voluntarily, Rodriquez denied consenting to the search. The supreme court observed that at the time Rodriquez allegedly gave his consent, he was surrounded by armed police officers, and the State's burden of showing that consent was freely and voluntarily given "cannot be discharged

by showing no more than acquiescence to a claim of lawful authority.” *Id.* at 661, 559 S.W.2d at 926.

We find the circumstances in the present case markedly different from those presented in *Rodriquez*. Unlike Rodriquez, who was stopped by police while traveling in his vehicle, our appellant drove himself to the police station and approached a police officer in the parking lot. Appellant reported an armed robbery attempt and gave the officer a key to his home so the officer could secure the crime scene. And while appellant disputes the fact that he consented to the officer entering his home, and he testified that the officer took the key from Espino, the trier of fact was not required to believe appellant’s version of events, as he was the person most interested in the outcome of the matter. *Champlin v. State*, 98 Ark. App. 305, ___ S.W.3d ___ (2007). It is clear that the trial court found the officer’s testimony more credible, a finding that we will not disturb on appeal. *See Hamilton, supra*.

Appellant also argues that “Smith’s use of the words ‘secure the crime scene’ obfuscated his intent to search the home” and that he was not advised of his right to refuse consent. However, these arguments were not made to the trial court below, and we will not address arguments made for the first time on appeal. *Yarbrough v. State*, 370 Ark. 31, ___ S.W.3d ___ (2007). A party cannot change the grounds for an objection on appeal, but is bound by the scope and nature of the objections and arguments presented at trial. *Tryon v. State*, 371 Ark. 25, ___ S.W.3d ___ (2007).

Because we find the trial court’s ruling was not clearly erroneous based on appellant’s consent to the officer entering his home, we decline to address appellant’s arguments

concerning the lack of probable cause or exigent circumstances. Accordingly, we affirm the trial court's denial of the motion to suppress.

Affirmed.

MARSHALL and BAKER, JJ., agree.